92-1588

Supreme Court, U.S.
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UNITED STATES SUPREME COURT

OCTOBER 1992 TERM

BRUCE E. COMMITTE

V.

THE UNIVERSITY OF VERMONT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRUCE E. COMMITTE
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1 April 1993

QUESTION FOR REVIEW

Whether a tenure track professor's state university contract and faculty handbook create a Fourteenth Amendment due process protected property interest in employment when they entitle the professor to a contract renewal decision limited in its discretion by explict, particularized, substantive performance evaluation criteria and the explicit promise of due process.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE SECOND CIRCUIT

Petitioner, Bruce E. Committe, prays that a writ of ceriorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on 28 December 1992; rehearing denied 15 March 1993.

OPINIONS BELOW

The United States Court of Appeals has not reported its opinion denying Committe's petition for rehearing in banc. See this opinion in the appendix hereto. (App. 1-2).

The United States Court of Appeals for the Second Circuit has not reported its opinion affirming the District Court judgment against Committe. See this opinion in the appendix hereto. (App. 2-9).

The United States District Court for the District of Vermont has not reported its opinion against Committe. See this opinion in the appendix hereto. (App. 9-12).

JURISDICTION

The United States Court of Appeals

for the Second Circuit filed on 15 March 1993 its panel decision (1) denying Committe's request for a rehearing and (2) noting therein that no other member of the court voted in the affirmative on Committe's suggestion that the rehearing occur in banc. (See App. 1-2). The basis of United States Supreme Court jurisdiction is 28 U.S.C. secs. 1254(1) and 2101(c).

U.S. CONSTITUTIONAL PROVISION, U.S. STATUTE, FACULTY APPOINTMENT LETTER, AND FACULTY HANDBOOK REGULATIONS INVOLVED

U.S. Const. amend. XIV, sec. 1, due process cl.:

> ...nor shall any state deprive any person of life, liberty or property, without due process of law;...

42 U.S.C. sec. 1983:

> Every person who, under color of any statute, ordinance, regulations, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Letter of second reappointment:

> June 1, 1989
>
> Bruce E. Committe
>
> Assistant Professor
>
> School of Business Administration

The University of Vermont

Kalkin Hall

Burlington, VT 05405

Dear Bruce:

This is formal confirmation that, as indicated in my memorandum to you of May 30, 1989, your first reappointment as Assistant Professor in the School of Business Administration has been approved. The period of this reappointment is for the 1990-91 and 1991-92 academic years.

Evaluation of your candidacy for second reappointment at assistant professor rank will begin in the Business School during fall, 1990. As you know, recommendations on second

reappointment as assistant professor are forwarded to the Provost for his review and decision.

Sincerely yours,

Richard G. Brandenburg

Dean

The University of Vermont Officers' Handbook January 1990 (italics in original):

205. *Probationary Service*....

.3 The initial appointments of full-time Officers of Instruction with the title of instructor, assistant professor, or associate professor are probationary in nature. The performance of an Officer of Instruction should be reviewed annually during this period. The record of performance and the

judgment of potential for future accomplishment form a basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

.4 Nonrenewal of an appointment does not carry with it implication of incompetence or misconduct on the part of the Officer of Instruction. In addition to consideration of individual performance, such decisions may be based on a variety of reasonably derived administrative, financial, or academic policy reasons; on an assessment of insufficient potential for future growth of the officer; or on a prior and independent judgment that the

position should be redefined.

.6 During the probationary period a teacher has the academic freedom accorded all other members of the faculty. Decisions affecting the renewal of a probationary appointment may not be capricious or carried out in violation of an officer's right to academic freedom.

208. *Probationary Periods*....

.2 Initial appointments as an assistant professor are on a probationary basis. Tenure will be granted to faculty members initially appointed as assistant professors at any time upon promotion to associate professor ....

222. *Appointments and Reappointments, without Tenure....*

.2 An assistant professor is initially appointed for a three-year term and may be appointed for two additional two-year terms....

.4 During or at the end of a term an instructor, assistant professor, or associate professor may be appointed to the next higher rank in accordance with Section 231 [p. 24 below].

223. *Criteria in Appointment, Reappointment, Promotion, and Tenure Decisions.*

.1 *General Considerations.* In considering candidates for appointment, reappointment, promotion, and/or tenure, each candidate will be judged

with respect to the proposed rank, status, and duties, considering his or her record of performance in teaching, research or other creative work, and service. The following subsections provide a framework of criteria and standards of evaluation within which judgments are made on the present achievements and future potential of the candidate.

In evaluating the candidate's qualifications within these three areas, reasonable flexibility shall be exercised, balancing where the case requires, heavier assignments and responsibilities in one area against lighter assignments and

responsibilities in another. Each candidate is expected to be engaged in a program of work which is sound and productive and which can be expected to continue to develop throughout his or her professional career. *In all instances, excellent intellectual attainment, in accordance with the criteria set forth below, is the crucial qualification for appointment or promotion to a tenured position.* Insistence upon this standard for continuing members of the faculty is necessary for maintenance of quality of the University as an institution dedicated to the discovery, preservation, and transmission of knowledge.

.2 *Teaching. Effective teaching is an*

essential criterion for initial appointment as an associate professor or professor, for reappointment at any rank, or for tenure or promotion.
The prime requisites for an effective teacher are intellectual competence, integrity, and independence; willingness and capacity to grow in the field, to consider suggestions and to cooperate in teaching activities; a spirit of scholarly inquiry which leads to the strengthening of both course content and presentation in light of developments in the discipline; a vital interest in teaching and working with students, and, above

all, the ability to stimulate their intellectual interest and enthusiasm; a capacity to awaken in students an awareness of the relationship of the subject to other fields of knowledge; an interest and skill in the general guidance and academic advising of students.

Academic advising of students is an important part of the mission of the University. Many faculty members perform this function. For these faculty members academic advising will be considered as part of the total teaching effort provided it is systematically evaluated.

Teaching must be evaluated regularly and the results of such

evaluation must be presented systematically and considered in all reappointments, promotion, and tenure decisions.

Elaboration: No single set of satisfactory measures can be prescribed. However, significant evidence for the evaluation of teaching can be derived from some combination of the following (not rank ordered): (1) opinions of members of the candidate's department, particularly if based on examination of course materials, on team teaching experiences,on class visitations, on attendance at lectures given by the candidate or the results of the

candidate's teaching in courses prerequisite to other members of department; (2) opinion of students,appropriately documented and interpreted, for example, through the use of student survey instruments and/or by seeking evaluation by students after course completion or after graduation; (3) development by the candidate of new and effective techniques of instruction and instructional materials, including textbooks, particularly when evidenced by acceptance at other universities: (4) publications by the candidate on the teaching of his/her discipline in respected journals; and (5) recognition or awards for distinguished teaching.

.3 *Research, Scholarship, and creative Work*. There must be evidence that the candidate is continuously and effectively engaged in scholarly activity of high quality and significance. Account shall be taken of the type and quality of creative activity normally expected in the candidate's field. Documented evidence must be provided of genuine scholarship, productivity, and creativity in the form of such things as published research or recognized artistic production, or engineering designs, etc. Teaching and scholarship go hand in hand. An institution of recognized quality must foster an environment which promotes

scholarship and teaching in a mutually supportive relationship. *Publication of research and other creative accomplishment must be evaluated, not merely enumerated.* *Elaboration:* Work in progress should be assessed whenever possible. When published work in joint authorship (or other product of joint effort) is considered, it is the responsibility of the department to establish as clearly as possible the role of the candidate in the joint effort. Appraisals of publication or other works in the scholarly and critical literature may provide important testimony.

If the record of the candidate includes journal articles, it is

the responsibility of the chair-person to communicate clear information concerning the publication and review standards of the journal and its standing in the discipline.

If the record of the candidate includes publication of a monograph or monographs, it is the responsibility of the chair-person to communicate clear information about the reviewing policies of the press and to report reviews published subsequent to the appearance of the work.

In cases involving tenure or promotion to associate professor, or professor, the quality and significance of the work must be

evaluated by the department. In addition, the department must solicit evaluations from acknowledged scholars or practitioners at other institutions.

If the record of the candidate includes presentations, invited and/or subject to peer evaluation, it is the responsibility of the chairperson to communicate clear information concerning the standards involved.

In certain disciplines in which competitive grant and contract support is available, a record of continuing support may be an indication of recognized research competence and productivity.

Textbooks, reports, and similar products connected with teaching

or public service should be considered creative work insofar as they present new ideas or incorporate the candidate's scholarly research.

In certain fields such as are, music, literature, and theater, distinguished production may be evidence of scholarship in much the same way as analytical research is in other disciplines. In evaluating artistic creativity, an attempt should be made to define the candidate's merit in the light of such criteria as originality, scope, and depth of creative expression.

In some instances, professional activities, such as service as editor of a professional journal

or service as a major officer of a professional organization, may be considered as recognition of scholarly achievement.

.4 *Service*. Service by all members of the faculty in their capacity as scholars is an essential part of the University's mission.

The faculty plays a vital role in the governance of the University at all levels and in the formulation of its policies. Effective service in this regard is expected of all faculty members. Recognition should be given to scholars who participate effectively and imaginatively in faculty governance and the formulation of departmental, college/school, and University policies. Similarly, contributions

to student welfare through service on student-faculty committees, as advisor to student organizations, or as contributor to the promotion of cultural pluralism of the University should be considered. Such contributions may include participation in programs on awareness of discrimination and harassment on the basis of race, gender, sexual orientation, religion, creed, national origin, ancestry, age, marital status, handicap, or political affiliations and beliefs; involvement in campus efforts to promote cultural diversity, or in the promotion of affirmative action.

Some persons may demonstrate their service contributions through

effective participation on the community, state, or national professional level, e.g. through service on accreditation teams, as a contributor to the promotion of cultural pluralism, as an officer of a professional organization, as a professional consultant, etc. *In certain of the colleges and schools, a demonstrated distinction in service responsibilities characteristic of the area may be an essential criterion for appointment, reappointment, promotion, and/or tenure.* Examples include extension work (agriculture, home economics, and natural resources), clinical practice (health disciplines), and field service (education).

Elaboration: All of the candidate's professional service activities should be scrutinized for evidence of achievement and of leadership in the field and in the development or utilization of new approaches and techniques for the solution of professional problems. Evidence must be provided of the quality of the service rendered, including evaluations by persons or agencies served....

231. *Procedure in Matters of Reappointment, Promotion, and tenure.*

.1 Department chairpersons shall annually review the performance of the faculty members of their departments and may recommend

reappointment, promotion, or tenure to the dean. In considering whether or not to recommend reappointments, promotion, and/or tenure, the chairperson shall request the advice of all probationary and tenured department members. In making a recommendation the chairperson shall report the extent of such consultation and the nature of the advice received.

It is not the intent of Section 231.1 that each faculty member be asked formally each year whether or not he or she wishes to be considered for promotion. Also, preparation of formal documentation of a recommendation is not required unless the department chairperson

is favorably inclined or unless the faculty member so requests. If the department chairperson decides not to recommend, written notice by the chairperson must be given to the candidate (1) if the consideration is a mandatory one, i.e. if required by a tenure or reappointment deadline, or (2), in the case of a potential promotion, if the faculty member asked to be considered.

.2 In the case of the first reappointment of an Instructor, Assistant Professor, and in all cases of reappointment of faculty members not on tenure track, the dean will reach and communicate a decision after considering the recorded opinion

of the Faculty Standards Committee of the college of school.

.3 In cases other than those covered by the preceding subsection, if a recommendation for reappointment, promotion, or tenure is made by the chairperson, then, after considering the recorded opinion of the Faculty Standards Committee of the college or school, the dean, if he or she concurs with the chairperson's recommendation, shall forward it to the Provost.

If the department chairperson recommends but the dean decides not to reappoint or not to recommend promotion, he or she shall either notify the faculty member directly

with copies to the chairperson and the Provost or notify the chairperson with copies to the others.

.4 The Provost shall submit the recommendation for review by the Faculty Affairs Committee, and after receiving their report, if he or she concurs with the recommendation, shall forward it to the President for Approval.

.5 In cases of reappointment, promotion, and/or tenure, and in cases of recommendations which are not approved by the Provost or by the President, the Provost informs the dean, who in turn informs the chairperson and the individual involved, of the decision.

.6 If the department chairperson decides not to recommend, the faculty member may request reconsideration in writing. The chairperson must prepare formal documentation and render a decision in writing within 45 days of receipt of a request for reconsideration. The faculty member may then appeal to the dean, stating, in writing, why he or she believes that the departmental decision should not be accepted.

If the dean decides not to approve a chairperson's recommendation or denies an appeal, the faculty member is entitled to reconsideration of the decision by the dean. A request for

reconsideration shall be in writing and, as described in the previous paragraph, shall set forth reasons. Following such reconsiderations, the faculty member is entitled to appeal to the Provost. Such appeal shall be in writing and shall set forth reasons for the request. In the event of a negative decision by the dean, formal documentation need not be forwarded to the Provost unless the faculty member so requests.

If the Provost decides not to approve a college or school recommendation or denies an appeal, the faculty member is entitled to reconsideration and then to appeal to the President.

Such request for reconsideration or appeal shall be in writing and shall present reasons.

A written request to the chairperson for reconsideration or a written appeal to the dean must be made within 45 days of notification of a negative decision. All other requests for reconsideration or appeal must be made within 25 days of notification of a negative decision.

In considering an appeal, the dean shall seek the advice of the college or school standards committee. Similarly, in considering an appeal, the Provost shall seek the advice of the Faculty Affairs Committee.

If either the dean, the Provost, or

the President considers an appeal, the same procedures should be followed as those which follow a positive recommendation.

A decision on the request for reconsideration or appeal must be made by the dean within 30 days of its receipt and must be made by the Provost or President within 45 days of its receipt.

If a faculty member is asked to supplement the formal documentation in connection with an appeal, he or she may do so only to the extent necessary to elucidate work completed prior to the original deadline for submission. A reviewing officer receiving an appeal may request an additional evaluation of such

information by the department and/or college or school before considering the appeal.

When these normal appeal processes are exhausted, the faculty member may petition the Grievance Committee (Section 270) provided the appeal has been based on an alleged lack of due process or an alleged infringement of fundamental rights including academic freedom.

.7 While the faculty member bears the burden of demonstrating his or her achievements and potential in matters of reappointment, promotion, and/or tenure, administrative officers have a responsibility to contribute to the professional development of the faculty member by communicat-

ing to that person their assessments of performance and progress. Whenever a negative decision is rendered at any stage on reappointment, promotion, or tenure, whether in the first instance or on reconsideration and/or appeal, a written explanation of the reasons will be provided to the faculty member by the appropriate officer.

224. *Termination of Tenured Appointment.*

.1 *Termination for Cause.* A tenured faculty member's appointment may be terminated by the Board of Trustees for cause, defined as demonstrated lack of professional or moral fitness, incompetence as a teacher, or gross neglect of duty....

.2 *Financial Exigency*. Termination of tenure for reasons of financial exigency will follow the principles in part 3(c) of the AAUP 1976 recommended institutional regulations....

.3 *Elimination of Program*. Elimination of an institutional program or academic organizational unit requires full consideration by the Academic Affairs Committee of the Faculty Senate. This Committee shall be guided in such deliberations by the criteria and procedures established for consideration of proposals for new programs....

STATEMENT OF THE CASE

In Spring of 1987 Respondent

University of Vermont first appointed Committe to a tenure track ("probationary") Assistant Professor position for an initial term of three academic years--1987-1988, 1988-1989, and 1989-1990. On 1 June 1989 the University contracted with Committe again (first reappointment) for two more academic years--1989-1990 and 1990-1991. This first reappointment contract promised Committe that the University would evaluate during Fall, 1990, his candidacy for his second reappointment. This second reappointment decision-making resulted in a decision not to renew Committe's contract. This decision is the subject matter of the case at bar. The complaint itself states, among other things, that the University denied Committe his property interest in

continued employment without due process of law.

In a decision filed 7 July 1992, the District Court opined that the University's decision did not implicate a Fourteenth Amendment due process protected property interest, and thus Committe was due no Fourteenth Amendment due process protection. The court, therefore, granted the University's motion for summary judgment and denied Committe's cross-motion for summary judgment.

In a decision filed 28 December 1992, the United States Court of Appeals for the Second Circuit denied Committe's appeal and affirmed the District Court's judgment.

In an opinion filed 15 March 1993 by the panel which decided the appeal, the

United States Court of Appeals for the Second Circuit denied Committe's petition for rehearing and noted that no other Second Circuit judge requested that a vote be taken regarding Committe's suggestion that a rehearing in banc occur.

Now Committe petitions the United States Supreme Court for a writ of certiorari to decide the issue whether a tenure track professor's state university contract and faculty handbook create a Fourteenth Amendment due process protected property interest when they entitle the professor to a contract renewal decision limited in its discretion by explicit, particularized, substantive performance evaluation criteria and the promise of due process.

The issue of whether Committe

received U.S. Constitutional due process is not now before the U.S. Supreme Court because the District and Appellate Courts' determination that an interest deserving of Fourteenth Amendment due process protection does not exist precluded these courts reaching the question of constitutional process.

ARGUMENT FOR GRANTING THE WRIT

The decision below conflicts with three applicable landmark decisions of the United States Supreme Court.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Court stated general indicia of "property" entitled to Fourteenth Amendment due process protection:

> To have a property interest in a benefit, a person clearly

> must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Regarding Roth's particular claim of a property interest in his faculty employment position at Wisconsin State University--Oshkosk, the Court found critical the fact that Roth's contract

with the University provided no rights whatsoever in contract renewal:

> But the important fact in this case is that they specifically provided that the respondent's employment was to terminate on June 30. They did not provide for contract renewal absent "sufficient cause." Indeed, they made no provision for renewal whatsoever.
>
> Thus, the terms of respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that

> secured his interest in re-employment or that created any legitimate claim to it. In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.

In Perry v. Sinderman, 408 U.S. 593, 596 and 602-603 (1972), the Court stated:

> We have made clear in *Roth*, *supra*, at 571-572, that "property" interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, "property" denotes

a broad range of interests that are secured by "existing rules or understandings."...

In this case, the respondent has alleged the existence of rules and understandings, promulgated and fostered by state officials, that may justify his legitimate claim of entitlement to continued employment absent "sufficient cause." We disagree with the Court of Appeals insofar as it held that a mere subjective "expectancy" is protected by procedural due process, but we agree that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of "the policies and practices of the

> institution"...Proof of such a property interest would not, of course, entitle him to reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for non-retention and challenge their sufficiency.

In Olim v. Wakinekona, 461 U.S. 238, 249 (1982) the Court provided indicia further instructive of when due process protected interests exists (although Olim focused on liberty rather than property, there is no reason why its principles as to the finding of a due process protected "liberty" interest should not also apply to the finding of a due process protected "property" interests):

> These cases demonstrate that a

State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981)(Brennan, J. concurring). If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," *Ibid.*, the State has not created a constitutionally protected liberty interest. See *id.*, at 466-467 (opinion of the Court);

see also *Vitek v. Jones*, 445 U.S., at 488-491 (summarizing cases).

> Hawaii's prision regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi*, 63 Haw., at 144-145, 621 p. 2d, at 980-981, the prison Administrator's discretion to transfer an inmate is completely unfettered. No standards govern or restrict the Administrator's determination.

Thus, given the language of Roth, Perry, and Olim, whether a state university faculty member has a

constitutionally due process protected interest in his state university employment will not depend upon any such rigid test such as whether he or she has tenure but instead will depend upon the legitimacy of his or her claim to continued employment. Whether such a claim is legitimate depends upon whether the faculty member's contract and university faculty handbook provide re-employment decision-making substantive criteria which the faculty member can invoke in a hearing to challenge the basis of a decision to not renew his contract.

Committe's contract promises that the University will engage in decision-making to determine whether his contract will be renewed. P. 5-6 above. The Faculty Handbook promises that

"[d]ecisions affecting the renewal of a probationary appointment may not be capricious." Section 205.6, p. 8 above. The Handbook further promises that renewal decision-makers will base their decision on the particularized, substantive criteria appearing in the Handbook. Section 223.1, pp. 9-11 above. The Handbook not only requires that decision-makers follow particularized, substantive criteria, it also states in great detail what these criteria are. Sections 223.1-223.4, pp. 11-24 above. These mandatory criteria surely amount to at least a "sufficient cause" basis for employment termination.

Furthermore, at any time during Committe's assistant professor appointment terms he had the right to cause decision-makers to evaluate his

candidacy for promotion to associate professor with tenure in accordance with the particularized substantive criteria in Handbook sections 221.1-223.4. No mandatory probationary period is required since Committe could have sought promotion with automatic tenure at any time. See Section 208.2, p. 8 above, and Section 231.1, last paragraph, item (2) at p. 26 above.

Also suggestive of a Fourteenth Amendment due process protected property interest in Committe's University employment is the Handbook's explicit guarantee of due process in contract renewal (and other faculty status) decision-making (Section 231.6, last paragraph, p. 33 above) along with a statement of reasons whenever a decision is negative (Section 231.7, pp. 33-34

above.

Before concluding, it is necessary to address the matter of employment termination for the extraordinary reasons stated in Handbook section 205.4. PP. 7-8 above. That section notes that reasons other than poor performance may be behind a decision not to renew a faculty member's contract (redefinition of the academic position, financial reasons, academic policy reasons, etc.). These extraordinary reasons--not related to performance of the faculty member--are similar in nature to those which may be "sufficient cause" for termination of a tenured faculty member (financial exigency, or elimination of program). Sections 224.1-.3, p.34-35 above.

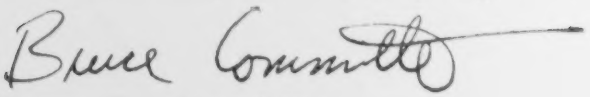
Clearly, given Ross, Perry, and Olim, Supra, Committe's contract and

Faculty Handbook provisions establish for him a due process protected property interest in his employment. The United States Court of Appeals for the Second Circuit erred in ruling otherwise. The apparent mistake of the Court of Appeals below was apparently in applying a non-authoritative and rigid "tenure" test in determining whether Committe had a property interest.

CONCLUSION

The United States Supreme Court should grant this petition for writ of certiorari. The United States Court of Appeals for the Second Circuit has ruled in a manner that conflicts with due process protected interest decisions of the United States Supreme Court (Ross, Perry, and Olim, supra).

Respectfully submitted by



Bruce E. Committe
Petitioner Pro Se
1336 N. Ode St. #1
Arlington, VA 22209
Phone (703) 243 6476

APPENDIX

Opinion of the United States Court of Appeals Filed on 15 March 1993.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of March, one thousand nine hundred and ninety-three.

Bruce E. Committe,

Plaintiff-Appellant,

v. 92-7755

University of Vermont,

Defendant-Appellee

A petition for rehearing containing a suggestion that the action be reheard in

banc having been filed herein by plaintiff-appellant Bruce E. Committe,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Elaine B. Goldsmith, Clerk
By Carolyn Clark Campbell
Chief Deputy Clerk.

Opinion of United States Court of Appeals for the Second Circuit Filed with the Clerk 28 December 1992:

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Court House in the City of New York on the 28th day of December, one thousand nine hundred and ninety-two.

PRESENT:

Hon. William H. Timbers,

Hon. Frank X. Altimari,

Hon. John M. Walker, Jr.,

Bruce E. Committe,

Plaintiff-Appellant

-v- 92-7755

The University of Vermont,

Defendant-Appellee

Plaintiff-appellant Bruce Committe appeals pro se from the judgment of the United States District Court for the District of Connecticut [sic--should be District of Vermont] granting summary judgment to the defendant-appellee The University of Vermont.

This cause came to be heard from the transcript of record of the United States District Court for the District of Connecticut [sic--should be District of Vermont] (Parker C.J.).

ON CONSIDERATION WHEREOF, it is now

hereby ordered, adjudged, and decreed that the judgment of the district court is AFFIRMED.

Committe, formerly an untenured professor at the University of Vermont, claims that the University's denial of his reappointment violated his property interest in his teaching position without due process of law. Committe received his first appointment as an assistant professor at the University for a term covering three academic years from 1987-1990. He received an additional two-year reappointment for 1990 through 1992. A second reappointment was denied. Committe subsequently filed suit in October 1991, alleging that the denial violated his constitutional rights. The district court, however, found that the

University's decision not to renew its contract with Committe did not implicate his property or liberty interests under the Constitution. Accordingly, the district court granted the University's motion for summary judgment.

Committe now appeals, arguing that the district court misunderstood the nature of his position within the University. He contends that the University's Officers' Handbook extends tenure track employees academic freedoms and procedural protections against dismissal, and that the University's failure to reappoint him violated these rights.

We find that these arguments are meritless, and that the district court properly granted summary judgment. The supreme Court has stated that Fourteenth

Amendment property rights are only implicated if an individual has a legitimate claim of entitlement to an employment position. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). Here, Committe had no legitimate expectation of continued employment with the University. It is clear from the Officers' Handbook that faculty reappointment is conditional and probationary, and that a professor such as Committe is only eligible for tenure after an uninterrupted seven-year probationary period. This holding comports with the decisions in other Courts of Appeals. See, e.g., King v. Board of Regents of the Univ. of Wisconsin System, 898 F.2d 533 (7th Cir. 1990); Lovelace v. Southeastern Massachusetts Univ., 793 F.2d 419 (1st

Cir. 1986); Kilcoyne v. Morgan, 664 F.2d 94 (4th Cir. 1981).

Since Committe does not have a constitutionally protected property interest in continued employment, the procedures implemented by the University in denying his reappointment need not comport with due process. However, we note that the record reveals that his reappointment was evaluated according to established University procedures outlined in the Officers' Handbook. Moreover, it is clear that Committe was not denied reappointment on any discriminatory basis but because the University determined that he failed to meet its expectations of his teaching skills.

Accordingly, the judgment of the district court is AFFIRMED.

Hon. William H. Timbers

Hon. Frank X. Altimari

Hon. John M. Walker, JR.

Opinion of the United States District Court for the District of Vermont

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF VERMONT

Bruce E. Committe,

Plaintiff,

v. 2:91-cv-281

The University of Vermont,

Defendant.

Opinion and Order

Plaintiff, a nontenured faculty member at the University of Vermont since 1987, brought suit against the university claiming a violation of his constitutional rights when his contract was not renewed following negative

reviews of his teaching effectiveness by a faculty committee and the university administration. Both parties seek summary judgment.

Plaintiff believes he was treated unfairly by those who reviewed his qualifications for continued employment at the university. The university disagrees. Certain facts are not in dispute, however. Plaintiff was not tenured and he had no promise of continued employment. The university's decision was not made for impermissible discriminatory reasons or in retaliation for plaintiff's exercise of constitutionally protected speech. Given those undisputed facts, plaintiff is unable as a matter of law to show that the university's decision or its procedures violated his constitutional

rights. The complaint and the materials submitted in support of plaintiff's motion for summary judgment are nothing more than statements of disagreement with defendant's discretionary decision. Without more, a public university's decision not to renew its contract with a faculty member does not implicate a property or liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 572-78 (1972). There are no material facts in dispute and the university is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

Defendant's motion for summary judgment is accordingly GRANTED. Plaintiff's cross-motion for summary judgment is DENIED.

Dated at Burlington, in the District of Vermont, this 6 day of July, 1992.

Fred I. Parker

Chief Judge

Supreme Court, U.S.
FILED
MAY 3 - 1993
OFFICE OF THE CLERK

No. 92-1588

In The

Supreme Court of the United States

October Term, 1992

BRUCE COMMITTE,

Petitioner,

vs.

UNIVERSITY OF VERMONT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE ISSUE

WHETHER THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT PETITIONER, A NON-TENURED FACULTY MEMBER AT A PUBLIC INSTITUTION OF HIGHER EDUCATION, HAD NO CONSTITUTIONALLY-PROTECTED PROPERTY INTEREST IN CONTINUED EMPLOYMENT.

STATEMENT OF THE CASE

This case involves the denial of reappointment to Petitioner Professor Bruce E. Committe (Prof. Committe), a former faculty member employed on a term contract basis by Respondent University of Vermont and State Agricultural College ("UVM"), a state-chartered and supported institution of higher education located in Burlington, Vermont ("UVM").

Prof. Committe received his first appointment as an assistant professor in the UVM School of Business Administration ("SBA") for a term covering the three academic years 1987-88 through 1989-90. He received one two-year reappointment covering academic years 1990-91 through 1991-92, and was then denied a second reappointment.

Prof. Committe filed suit in the United States District Court for the District of Vermont on October 1, 1991, claiming that the denial of a second reappointment infringed his constitutionally-protected rights. UVM answered the complaint on October 10, 1991. On November 4, 1991 Prof. Committe filed a pleading indicating that he was ready for trial. On November 14, 1991, UVM filed a Motion for Summary Judgment. Prof. Committe

thereafter filed a Cross-Motion for Summary Judgment. On July 6, 1992, Chief Judge Fred I. Parker granted UVM's motion and denied Prof. Committe's cross-motion on the grounds, *inter alia*, that no constitutionally-protected liberty or property interest was implicated in UVM's decision not to reappoint Prof. Committe.

Prof. Committe appealed the due process issue to the Second Circuit Court of Appeals. On December 28, 1992, the Court of Appeals affirmed the grant of summary judgment in favor of UVM, holding that Prof. Committe had no legitimate expectation of continued employment at UVM, under the clear terms of the parties' contract. On March 15, 1993, the Court denied Prof. Committe's petition for rehearing en banc, noting that no Judge of the Court had requested that a vote be taken thereon.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

1. The pertinent circuit court decisions, following the decisions of this Court, consistently hold that absent a legitimate expectation of continued employment, a non-tenured faculty member at a public institution of higher education, like Petitioner, has no constitutionally-protected right to due process in a decision not to renew his employment contract.

2. The decision-making process by which Petitioner was denied reappointment complied with all arguably applicable due process requirements.

ARGUMENT

A nontenured faculty member at a public institution of higher education must show more than a unilateral expectation of continued employment to claim due process rights in connection with the institution's decision not to renew his employment contract.

The *Officers' Handbook* which governs relations between UVM and its faculty members created no property interest in continued employment that would have entitled Prof. Committe to constitutionally-mandated due process protections prior to UVM's decision not to renew his contract.[1] Furthermore, review by certiorari is particularly inappropriate in this case because UVM in fact afforded Prof. Committe all of the procedural protections specified by the *Handbook* provisions. For these reasons, Prof. Committe's Petition for a Writ of Certiorari should be denied.

I. IN THE ABSENCE OF A LEGITIMATE EXPECTATION OF CONTINUED EMPLOYMENT, A NONTENURED FACULTY MEMBER AT A PUBLIC INSTITUTION OF HIGHER EDUCATION HAS NO CONSTITUTIONALLY-PROTECTED RIGHT TO DUE PROCESS IN THE DECISION NOT TO RENEW HIS EMPLOYMENT CONTRACT.

Prof. Committe claims as a basis for his petition that the Court of Appeals' decision conflicts with "three

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[1] The text of most of the pertinent provisions of the *Handbook* is set forth in Prof. Committe's Petition at pages 6-35. The text of any additional pertinent provisions is set forth herein.

applicable landmark decisions" of this Court. Petition for Writ at 39-51 (citing *Olim v. Wakinekona*, 461 U.S. 238 (1982) (considers Fourteenth Amendment liberty interests in prison context); *Perry v. Sinderman*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972)). This is a misstatement of the applicable law.

It is settled law, in accordance with the decisions of the circuit courts and this Court, *see* Sup. Ct. R. 10.1(a), (c), that to be entitled to due process, one must have suffered by state action the loss of a property or liberty interest. *Clark v. Whiting*, 607 F.2d 634, 641 (4th Cir. 1979) (citing *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974); *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 421 (1st Cir. 1986) (citing *Board of Regents v. Roth*, 408 U.S. 564 (1972)). Prof. Committe argues here, as in the district and circuit courts, that UVM's decision not to renew his contract implicates Fourteenth Amendment property rights. However, as this Court observed in *Board of Regents v. Roth*, "[t]o have a property interest in a [job], a person clearly must have more than an abstract desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." 408 U.S. at 577. It is a virtually universal rule that a university professor hired as a probationary employee, without tenure and on a term contract basis, has no constitutionally-protected property interest in continued employment. See, e.g., *King v. Board of Regents of the University of Wisconsin System*, 898 F.2d 533 (7th Cir. 1990); *Upadhya v. Langenberg*, 834 F.2d 661 (7th Cir. 1978), *cert. denied*, 486 U.S. 1033 (1988); *Lovelace*, 793 F.2d at 421; *Beitzell v. Jeffrey*, 643 F.2d 870, 874-75 (1st Cir. 1981).

To establish a "legitimate claim of entitlement" and therefore a property interest in continued employment, university faculty members must "look to 'existing rules or understandings that stem from an independent source such as state law. . . . ' " *Royster v. Board of Trustees of Anderson County School District,* 774 F.2d 618 (4th Cir. 1985) (quoting *Board of Regents v. Roth,* 408 U.S. at 577). "In the context of employment in public education, the independent source for the property interest has been said to be a contract which provides for continued employment, and which can be terminated *only for good cause." Id.* (emphasis added).

The terms and conditions of faculty employment at UVM are governed by the provisions of individual contracts and more generally by the provisions of the *Officers' Handbook.* Prof. Committe argues that the *Handbook* is an independent source for his claimed property interest. He claims that the Court of Appeals employed an overly rigid "tenured versus nontenured" test in finding that he had no legitimate expectation of continued employment. Petition at 47. This is a misstatement. The Court of Appeals did not base its decision on a mere semantic distinction; rather, it considered the governing contract language, and based its decision on the functional characteristics of petitioner's nontenured status. *See* Petition App. at 7 (*Committe v. University of Vermont,* No. 92-7755, slip op. (2d Cir. Dec. 28, 1992)). Prof. Committe also claims that the *Handbook*'s description of various criteria to be considered in the decision-making process gives him a legitimate expectation of continued employment. This argument ignores the *Handbook* provisions which emphasize the probationary nature of Prof. Committe's

employment, and amounts to a misstatement of fact. The Court of Appeals correctly rejected the argument in light of the *Handbook*'s clearly-stated probation provisions. *Id.*

As noted by the Court of Appeals, the *Officers' Handbook* provides at Section 208.2 that "[i]nitial appointments as an assistant professor are on a probationary basis." Petition at 8. An assistant professor becomes eligible for tenure at the rank of assistant professor "only after an uninterrupted seven-year probationary period." Section 208.2 [Petition at 8]. Promotion of an assistant professor to the rank of associate professor, whether done at the expiration of the seven-year probationary period or earlier, also results in the grant of tenure. Section 208.3. Neither tenure nor promotion is automatic, however. The *Officers' Handbook* provides:

> [t]he performance of an Officer of Instruction should be reviewed annually during this [probationary] period. The record of performance and the judgment of potential for future accomplishment form a basis for decisions concerning renewal of the appointment or the eventual decision to grant tenure or not.

Section 205.3 [Petition at 6-7]. Similarly, the section of the *Officers' Handbook* which describes criteria to be used in making reappointment and tenure decisions states:

> .1 *General Considerations.* In considering candidates for . . . reappointment . . . each candidate will be judged with respect to the proposed rank, status, and duties, considering his . . . record of performance in teaching, research or other creative work, and service.
>
> . . . .

> *In evaluating the candidate's qualifications within these three areas, reasonable flexibility shall be exercised. . . .*

Section 223.1 [Petition at 10-11] (emphasis in original). *See also Officers' Handbook* sections 223.2-223.4 [Petition at 12-24]. As noted by the Court of Appeals, Prof. Committe was denied reappointment because his teaching skills failed to meet UVM's expectations.[2] *Handbook* section

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[2] Petition App. at 8 (*Committe v. University of Vermont*, No. 92-7755, slip op.). Specifically, after reviewing student course evaluations, letters from students and alumni, course materials and reports of classroom visits by other faculty, the Faculty Standards Committee ("FSC") concluded:

> Professor Committe's classroom instruction needs more attention and improvement. Special concerns include the ineffective use of class time, the lack of organization in presenting the subject matter and the lack of clear and crisp responses to student's questions.

Respondent's Appendix to Court of Appeals at 13.

> As its "Overall Recommendation" the FSC concluded: Given that one of the most important missions of the School of Business is excellence in undergraduate teaching, Professor Committe's poor performance in the classroom was perceived by the FSC as a very serious flaw. The FSC recommends that Professor Bruce Committe not be reappointed. The vote on reappointment was 3-yes, 13-no, 0-abstentions.

Respondent's Appendix to Court of Appeals at 14. After the FSC recommendation, the renewal issue went to the Dean of SBA, whose written decision accepting that recommendation included the following:

> Dr. Committe's teaching performance does not meet standards and expectations for second reappointment at Assistant Professor rank. . . . Further, although Dr. Committe was notified of concerns and suggestions with respect to teaching at the time of his first reap-

223.2, [Petition at 11-15], sets forth an extensive, non-exclusive description of factors to be considered in the evaluation of teaching performance.

Thus, the *Handbook* does give some guidance on how performance in general, and teaching effectiveness in particular, may be evaluated in considering a renewal contract. However, the mere delineation by an institution of guidelines or standards does not turn otherwise-probationary employment into a constitutionally-protected expectation. As one court reasoned:

> [I]n view of the substantial commitment a university makes to an individual by granting him tenure, universities have a strong need for, and traditionally have enjoyed a wide discretion in exercising what is largely a subjective judgment in deciding whom to grant tenure. By specifying in writing the usual criteria for promotion – teaching, scholarship, service – a university does not thereby set objective criteria, constricting its traditional discretion or transforming a largely judgmental decisional process into an automatic right to, or property interest in, tenure. That reappointment, rather than tenure, is at stake in the present case does not affect our conclusion, for plaintiff's argument would apply as well to one as the other.

> pointment, it is not apparent that he has made efforts to generate additional or alternative information, or take other steps demonstrating his teaching effectiveness.

Respondent's Supplemental Appendix to Court of Appeals at 97.

Lovelace v. Southeastern Massachusetts University, supra, 793 F.2d at 422 (citations omitted). *See also Goodisman v. Lytle,* 724 F.2 818, 821 (9th Cir. 1984); *Stebbins v. Weaver,* 537 F.2d 939, 942 (7th Cir. 1976).[3]

Prof. Committe also ignores the distinction made in the *Officers' Handbook* between the grounds for non-renewal of a probationary contract and the grounds for termination of a tenured appointment. *Handbook* section 205.4 states:

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[3] The Fourth Circuit has also reached the same result in a case where the defendant university's faculty handbook provided greater procedural protections than would be required if due process were mandated. In *Kilcoyne v. Morgan,* 664 F.2d 940 (4th Cir. 1981), a nontenured faculty member argued that the procedures used by his university in denying him tenure failed to conform precisely to the procedures outlined in the faculty manual. The court observed:

> [f]ar from disclosing a violation of his constitutional rights, Kilcoyne's complaint reveals that ECU provided procedural safeguards beyond the requirements of the Fourteenth Amendment. Because he lacked a right to further employment at ECU, his denial of tenure and further employment without *any* procedural safeguards would have been permissible under the Fourteenth Amendment.

Id. at 942. If Kilcoyne's employer had gratuitously afforded tenure applicants procedural safeguards not constitutionally required, "deviations from those procedures would not support a claim under the Fourteenth Amendment and Section 1983." *Id.* While Prof. Kilcoyne argued that the procedures were more than gratuitous by virtue of being set forth in the faculty manual, the court nevertheless held that a contractual claim for breach of promise "is not elevated to a constitutional question solely because the State is a party to the contract." *Id.*

> nonrenewal of an appointment does not carry with it implication of incompetence or misconduct on the part of the Officer of Instruction. *In addition to considerations of individual performance, such decisions may be based on a variety of reasonably derived administrative, financial, or academic policy reasons;* on an assessment of insufficient potential for future growth of the officer; or on a prior and independent judgment that the position should be redefined.

[Petition at 7-8] (emphasis added). Thus, the *Handbook* clearly states that nonrenewal decisions may be based on factors other than the "particularized, substantive criteria" contemplated by Prof. Committe. *See* Petition at 47-48.

Termination of a tenured position, on the other hand, may be done only by UVM's Board of Trustees, "for cause, defined as demonstrated lack of professional or moral fitness, incompetence as a teacher, or gross neglect of duty." *Officers' Handbook*, section 224.1. It is clear from the *Handbook* provisions, therefore, that a distinction was intended between nonrenewal of a nontenured employment contract, and termination of a tenured contract, and only the latter requires "cause" in a sense that could give rise to a protected property interest.

For these reasons, the Court of Appeals was correct in holding that Prof. Committe had no legitimate expectation of continued employment that would entitle him to due process protections, under the applicable decisions of this Court and consistent with the other Courts of Appeals that have considered the issue.

II. THE DECISION-MAKING PROCESS BY WHICH PETITIONER WAS DENIED REAPPOINTMENT COMPLIED WITH ALL ARGUABLY APPLICABLE DUE PROCESS REQUIREMENTS.

Should this Court be inclined to reconsider its clear decisions in the area of due process entitlement for non-tenured faculty members at public institutions of higher education, this case is not an appropriate vehicle for such reconsideration.

Because the Court of Appeals held that Prof. Committe had no legitimate expectation of continued employment at UVM and thus was not entitled to due process, it was not strictly necessary for the Court to consider the issue of whether Prof. Committe in fact *received* due process. Nonetheless, it is noteworthy that the Court of Appeals found on a review of the record that Prof. Committe's reappointment was evaluated according to established university procedures, and thus that he received all process to which he was arguably entitled under the Constitution and his contract with UVM. Petition App. at 8 (*Committe v. University of Vermont*, No. 92-7755, slip op.). The Court also noted that Prof. Committe was not denied reappointment for any discriminatory reason, but rather because his teaching skills failed to meet UVM's expectations. *Id. See also* footnote 2, *supra*.

Therefore, because the Court of Appeals essentially found that there is no substantive merit to Prof. Committe's claims under the standard for summary judgment, a finding by this Court on the abstract question of

entitlement to due process would ultimately have no practical effect on the outcome of this case.

CONCLUSION

Prof. Committe's Petition raises no issue that would warrant the grant of certiorari in this case. In accordance with the pertinent circuit court decisions, following the decisions of this Court, *see* Sup. Ct. R. 10.1(a), (c), the Court of Appeals correctly concluded that Prof. Committe had no legitimate expectation of continued employment at UVM that would entitle him to due process protections. Furthermore, the decision-making process by which UVM denied reappointment to Prof. Committe complied with all arguably applicable due process requirements. For these reasons, Prof. Committe's Petition for Writ of Certiorari should be denied.

Respectfully submitted, this 3rd day of May, 1993.

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